



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 240

Tribunal File Number: AD-16-283

BETWEEN:

S. F.

Applicant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 28, 2016

REASONS AND DECISION

OVERVIEW

[1] At its core, this case is about whether the Social Security Tribunal was required to transfer the Applicant's appeal to the Tax Court of Canada given that the appeal was determined to have been filed out of time.

[2] The Applicant seeks leave to appeal the decision of the General Division dated January 25, 2016. The General Division refused to extend the time for filing an appeal, pursuant to subsection 52(2) of the *Department of Employment and Social Development Act* (DESDA). The Applicant applied for leave to appeal on February 10, 2016, alleging that her notice of appeal had been filed on time and therefore the General Division member erred in determining whether he should exercise his discretion and grant an extension of time to file an appeal. She filed additional submissions on March 15, 2016. For the Applicant to succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] Does the appeal have a reasonable chance of success?

FACTUAL BACKGROUND

[4] The relevant facts for the purposes of this application are as follows. On December 13, 2013, the Respondent denied the Applicant's application for a Guaranteed Income Supplement on reconsideration. The Applicant indicates in her Notice of Appeal that she received the reconsideration decision on December 20, 2013 (GD1-NOA).

[5] The Member found that the reconsideration decision had been communicated to the Applicant by December 25, 2013. The Member determined that, in accordance with paragraph 52(1)(b) of the DESDA, the Applicant had until March 25, 2014 to file an appeal. He found that the Applicant appealed the reconsideration decision to the Social Security Tribunal on May 9, 2014, beyond the 90-day limit set out in paragraph 52(1)(b) of the DESDA.

[6] The Member proceeded to consider whether he should exercise his discretion and extend the time for filing the appeal. He referred to the four factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883 and to the overriding test set out in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, that the interests of justice be served. Ultimately, the Member determined that the interests of justice would not be served if he were to grant an extension, as he found that there was no arguable case. In his review of the matter, he determined that the dispute relates solely to the calculation of the Applicant's income for the purposes of entitlement to the GIS and that, as such, he did not have the jurisdiction to hear the matter on appeal in any event. The member referred to subsection 28(2) of the *Old Age Security Act (OASA)*.

SUBMISSIONS

[7] The Applicant submits that she filed an appeal with Service Canada on March 7, 2014 and that the General Division therefore should have considered her appeal to have been filed on time.

[8] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However, the Respondent did not file any submissions.

ANALYSIS

[9] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[11] The Member indicated that the appeal pertained to the Applicant's entitlement to GIS. In his review of the reconsideration decision and the Notice of Appeal, he determined that the dispute related solely to the calculation of the Applicant's income for the purposes of entitlement to the GIS. The Member cited subsection 28(2) of the OASA. The subsection reads:

Reference as to income

(2) If, on an appeal to the Social Security Tribunal, it is a ground of the appeal that the decision made by the Minister as to the income or income from a particular source or sources of an applicant or beneficiary or of the spouse or common-law partner of the applicant or beneficiary was incorrectly made, **the appeal on that ground must, in accordance with the regulations, be referred for decision to the Tax Court of Canada**, whose decision, subject only to variation by that Court in accordance with any decision on an appeal under the *Tax Court of Canada Act* relevant to the appeal to the Social Security Tribunal, is final and binding for all purposes of the appeal to the Social Security Tribunal except in accordance with the *Federal Courts Act*. (My emphasis)

[12] By refusing an extension of time, the Member effectively deprived the Applicant of any right of appeal before the Tax Court of Canada. However, subsection 28(2) of the OASA indicates that the Social Security Tribunal is required to refer the Applicant's appeal to the Tax Court of Canada for adjudication.

[13] There is an arguable case that the General Division exceeded its jurisdiction in effectively depriving the Applicant any right of appeal before the Tax Court of Canada. I am therefore satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[14] The application for leave to appeal is granted.

[15] I invite the parties to make submissions as to whether a hearing is required or whether the appeal can be done on the record. If they advocate for a hearing, the parties should make submissions in respect of the form that the hearing should take (i.e. whether it should be conducted by teleconference, videoconference or other means of telecommunication, whether it should be held in-person or conducted by exchange of written questions and answers). If a party requests a hearing other than by exchange of written questions and answers, I invite that party to provide an estimate of the time required to prepare oral submissions.

[16] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division